Supreme Court, U.S.
FILED

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No.

IN THE

# Supreme Court of the United States

KATHLEEN BROCKMAN,

*Petitioner,*

v.

WYOMING DEPARTMENT OF FAMILY SERVICES, and GLENNDA LACEY, LES POZSGI, MERIT THOMAS, ROBERT D. KUCHERA, SHIRLEY R. CARSON, and DANA WARD, each individually and in his/her official capacity with the Wyoming Department of Family Services,

*Respondents.*

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Tenth Circuit

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. Is the Tenth Circuit Court of Appeals decision, which holds that collateral estoppel barred Kathleen Brockman from litigating her Family Medical Leave Act claim in federal court as a result of an administrative law judge's decision on summary judgment finding that her employer had established good cause for the termination of Brockman's employment, contrary to the legislative intent when Congress enacted the FMLA?

II. Is the Tenth Circuit Court of Appeals decision, which holds that collateral estoppel barred Kathleen Brockman from litigating her Family Medical Leave Act claim in federal court as a result of an administrative law judge's decision on summary judgment finding that her employer had established good cause for the termination of Brockman's employment, contrary to a decision from the Second Circuit Court of Appeals decision which found that collateral estoppel does not apply to a federal FMLA claim when no hearing occurred during a related administrative process?

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## I. CITATIONS TO LOWER COURT AND AGENCY DECISIONS

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*Brockman v. Wyoming Dept. of Fam. Svcs.*, 00-CV-087-B (D. Wyo. 2001) (unpublished decision)

*In re. Dept. of Fam. Svcs. v. Brockman*, OAH Docket No. 00-006-006 (1999) (unpublished decision)

## II. JURISDICTIONAL STATEMENT

The Tenth Circuit Court of Appeals issued its decision on September 4, 2003.

A petition for rehearing was denied on October 1, 2003.

Jurisdiction is conferred on this Court pursuant to 28 U.S.C. § 1254(1).

## III. RELEVANT STATUTES AND REGULATIONS

29 U.S.C. § 2601 *et seq.* (Family and Medical Leave Act)

## IV. STATEMENT OF THE CASE

Brockman was terminated from her employment with the State of Wyoming's Department of Family Services (DFS) effective May 17, 1999. App. at A-5. Brockman filed an appeal of her termination with the Office of Administrative Hearings. *Id.* On summary judgment, the administrative law judge found that DFS had "good cause" to terminate Brockman because she "was incapable of performing her duties" because she was on leave. *Id.* at A-45 ¶ 5. Brockman did not seek appellate review of the ALJ's decision. *Id.*

Subsequently, Brockman filed a federal lawsuit asserting, in part, that she was terminated in violation of the Family Medical Leave Act. *Id.* at A-5-6. The trial court was vested with jurisdiction over Brockman's FMLA claim pursuant to 28 U.S.C. §§1331 and 1343 and 29 U.S.C. § 2601 *et seq.* (Family and Medical Leave Act).

On summary judgment, the lower court found that Brockman was collaterally estopped from asserting her claim under the FMLA by virtue of the ALJ's decision on summary judgment. App. at A-6.

Brockman filed an appeal with the Tenth Circuit Court of Appeals. *Id.* The Tenth Circuit affirmed the lower court's determination that Brockman was collaterally estopped from asserting her claim under the FMLA by virtue of the ALJ's decision on summary judgment. *Id.* at A-10-14.

## V. COLLATERAL ESTOPPEL SHOULD NOT APPLY TO FMLA CLAIMS.

The Tenth Circuit adopted the respondents' argument that Brockman was collaterally estopped from litigating her FMLA against the state in federal court. *Id.* The respondents claim that Brockman had a full and fair opportunity to litigate those issues in the administrative process provided for terminated state employees. *Id.* at A-23. A state hearing officer, Deb Baumer granted summary judgment to DFS on Brockman's appeal of her termination. *Id.* at A-45. Without the benefit of any discovery or a hearing, Baumer found that DFS had good cause to terminate Brockman. *Id.* at A-40 ¶4. Brockman did not seek appellate review of Baumer's decision. *Id.* at A-5.

### A. Invoking Collateral Estoppel Is Contrary To The Legislative Intent Of The FMLA.

This Court has held "that when a state agency 'acting in a judicial capacity. . . resolves *issues of fact* properly before it which the parties have had an adequate opportunity to litigate,' federal courts must give the agency's *factfinding* the same preclusive effect to which it would be entitled in the State's courts." *University of Tennessee v. Elliott*, 478 U.S. 788, 799 (1986) (emphasis added).[1] However, the "courts do not have free rein to impose rules of preclusion, as a matter of policy, when the interpretation of a statute is at hand." *Astoria Fed. S.&L. v. Solimino*, 501 U.S. 104, 108 (1991).

Indeed, this Court has held that judicially unreviewed findings of state administrative agencies do not have preclusive effect on Title VII claims, regardless of the preclusive effect the state courts might accord to the administrative hearings. *Elliott*, 478 U.S. at 794-96. This Court has extended *Elliott* to cases brought under the Age Discrimination in Employment Act, examining the broad scheme of the ADEA and its enforcement provisions to hold that Congress did not intend for administrative hearings to have preclusive effect. *Astoria*, 501 U.S. at 112-13.

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[1] The Wyoming Supreme Court has stated that four factors should be analyzed in determining whether a decision by an administrative law judge should be given preclusive effect in subsequent litigation:

> (1) whether the issue decided in the prior adjudication was identical with the issue presented in the present action; (2) whether the prior adjudication resulted in a judgment on the merits; (3) whether the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication; and (4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding.

*Kahrs v. Board of Trs.*, 901 P.2d 404, 406 (Wyo. 1995).

In *Astoria*, this Court ruled that Congress does not need to express a clear statement of its intent not to have the courts recognize preclusion by judicially unreviewed state administrative decisions in regard to a specific federal statue. *Astoria*, 501 U.S. at 108. The test is whether the statutory language "carries an implication that federal courts recognize no preclusion" with respect to the FMLA. *Id.* at 110. The *Astoria* court examined the ADEA and determined that because the Act allowed a federal agency to review an employee's case after state agency review that preclusion should not be recognized in ADEA cases. "What does not preclude a federal agency cannot preclude a federal court." *Id.* at 110-11.

The same may be said with respect to the FMLA. A complainant under the FMLA may either file suit in court or a complaint with the Secretary of Labor. 29 U.S.C. § 2617(a)&(b). The Secretary of Labor may file a civil action in court on behalf of the employee. If the secretary undertakes legal action, then the employee's right to file a civil action ends. *Id.*

As with the ADEA, if an employee has already gone through a state administrative process – which a terminated employee is likely to have done if such an appeal process is available under the state personnel rules like it was in this case -- then the federal proceeding by the Department of Labor "would be strictly pro forma if the state administrative findings are to be given preclusive effect." *Astoria*, 501 U.S. at 111. Likewise, the employee's right to file a civil action would be illusory.[2]

Furthermore, the FMLA's legislative history indicates that its remedial provisions are to mirror those in the FLSA. *See* S. REP. NO. 103-3, at 35 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 37. The courts have "uniformly interpreted

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[2] The FMLA, like the other employment acts, provides the right to file an action in federal court. 29 U.S.C. §2617(a)(2).

[the remedial provisions of the FLSA] to provide a right to a jury trial." *Feltner v. Columbia Pictures*, 523 U.S. 340, 347 (1998). Opponents of the FMLA in Congress on at least three occasions pointed to the fact that the Act would allow covered employees a jury trial. *See Frizzell v. Southwest Motor Freight*, 154 F.3d 641, 644 (6th Cir. 1998). Therefore, Congress intended to provide a jury trial in FMLA cases.

The legislative history supports the implication that Congress intended that aggrieved employees receive a trial de novo before a jury pursuant to the FMLA and did not intend for the courts to recognize preclusion by administrative proceedings. The Senate Report states, "Rights established under the FMLA are enforceable through civil actions. Under section 107 a civil action for damages and equitable relief may be brought against an employer in any Federal or State court of competent jurisdiction by the Secretary of Labor or by an employee...." S. REP. NO. 103-3, p. 35. Damages that may be awarded by the court include lost wages and benefits, and other monetary losses, as well as liquidated damages and attorney fees. *Id.* at 35-36.

Applying collateral estoppel to Brockman in this case would deny her the right to a jury trial on her FMLA claims. If Brockman had pursued judicial review of the administrative hearing officer's decision in state court, she could not have been granted a jury trial. The state district court sits as an intermediate appellate court with the power only to review actions taken by the administrative agency. *McGuire v. McGuire*, 608 P.2d 1278 (Wyo. 1980). The state court must uphold the hearing officer's decision if it is supported by "substantial evidence." *Olheiser v. State, ex rel. Wyo. Worker's Comp. Div.*, 886 P.2d 269 (Wyo. 1994). Such is not the jury trial that Congress intended for employees who have had their FMLA rights violated. In summary, Congress intended, as it did with Title VII and the ADEA, that the preclusive effect not be given to judicially unreviewed decisions by state hearing officers with respect to the FMLA.

**B. The Tenth Circuit Decision Here Is Contrary To A Second Circuit Decision.**

Only two Courts of Appeal have considered the issue of whether a state administrative decision – issued without the benefit of discovery or a hearing -- can be used to invoke the doctrine of collateral estoppel to bar subsequent FMLA litigation in federal court. In this case, the Tenth Circuit found that the ALJ's decision on summary judgment barred Brockman from pursuing her FMLA claim in federal court. The court stated:

> The district found that "the hearing examiner engaged in a thorough and far reaching examination of Brockman's claims arising from her discharge." Ms. Brockman was represented by counsel at the administrative hearing, she raised numerous issues, and the agency provided an opportunity for discovery. Further the officer conducting the hearing ruled with respect to Ms. Brockman's claims. We therefore see no reason to question the district court's conclusion that the administrative hearing comported with judicial standards . . . .

*Brockman*, 342 F.3d at 1166 (citation omitted).

In contrast, the Second Circuit Court of Appeals has found that an administrative decision reached without the benefit of a hearing should not bar to a subsequently filed FMLA claim in federal court. *Kosakow v. New Rochelle Rad. Assoc.*, 274 F.3d 706 (2nd Cir. 2001). The court wrote:

> the DHR finding of no probable cause was not based on a determination made by a preponderance of the evidence. The DHR determination was simply that there was "no probable cause" to believe that Kosakow's termination was the result of discrimination on the basis of her disability. Moreover as fully explained below, without any discovery or any type of hearing, it can hardly be

> said that this determination was made based on a fully developed record.

*Id.* at 733 (footnotes omitted). The court wrote further:

> The nature and extent of the DHR proceeding is far less formal than that of the present case. Kosakow did not receive any type of hearing wherein she could confront the witnesses against her. While this is not dispositive – as a case by way of summary judgment without a full hearing – nevertheless, given the informal nature of the evidentiary submissions at DHR, the lack of a full hearing is relevant.
>
> Moreover, the determination of no probable cause by the DHR was made after review of evidence and written statements by potential witnesses, but Kosakow was not entitled to any discovery prior to this determination. In contrast, she would not be subject to a summary judgment motion in a judicial proceeding until after discovery, including the opportunity to discover contrary documentary evidence and depose the defendant's witnesses. Thus, while there is similarity between the DHR proceeding and a motion for summary judgment under the federal rules, it cannot be ignored that the DHR makes factual conclusions based on a record that is far less developed than that before a federal court.

*Id.* at 735 (citations omitted).

Here, the District Court and the Tenth Circuit failed to recognize that the hearing examiner in Brockman's administrative challenge granted the state's motion for summary judgment based solely on the parties' prehearing submissions; no discovery on the part of Brockman or a hearing occurred. Collateral estoppel should not apply under these circumstances.

## VI. CONCLUSION

For two independent reasons, Brockman respectfully requests that the Tenth Circuit's decision be reversed. First, the legislative intent relating to the FMLA reflects that collateral estoppel should not apply to claims brought under its provisions. Second, an administrative decision issued without the benefit of discovery or a hearing should not have collateral estoppel effect on subsequently filed federal FMLA claims.

Respectfully submitted,

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Dated: December 30, 2003

**UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**

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| | |
|---|---|
| KATHLEEN BROCKMAN,<br>Plaintiff-Appellant,<br>v.<br>WYOMING DEPARTMENT OF FAMILY SERVICES, et al.,<br>Defendants – Appellees. | No. 01-8046 |

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***ORDER***

Filed October 1, 2003

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Before **HENRY, ANDERSON,** and **MURPHY**, Circuit Judges.

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Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

By: s/_____
Deputy Clerk

**United States Court of Appeals for the Tenth Circuit**
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October 1, 2003

NOTIFICATION OF MAILING

*Re: 01-8046, Brockman v. Family Services*

Dist/Ag docket: 00-CV-87-B

A COPY OF THE ATTACHED ORDER HAS BEEN PLACED IN THE UNITED STATES MAIL THIS DATE, ADDRESSED AS FOLLOWS:

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# UNITED STATES COURT OF APPEALS
# FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

SEPT 4 2003

PATRICK FISHER
Clerk

KATHLEEN BROCKMAN,

Plaintiff-Appellant,

v.

WYOMING DEPARTMENT OF FAMILY SERVICES; and GLENNDA LACEY,LES POZSGI, ROBERT D. MERIT THOMAS, KUCHERA, SHIRLEY R. CARSON, and DANA WARD, each Individually and in his/her official capacity with the Wyoming Department of Family Services,

Defendants-Appellees.

No. 01-8046

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## APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING (D.C. No. 00-CV-087-B)

Bruce T. Moats, of the Law Office of Bruce T. Moats, Cheyenne, Wyoming (Karen S. Beausoleil, Esq., Granite Canon, Wyoming, with him on the briefs), for Plaintiff-Appellant.

Terry L. Armitage, Cheyenne, Wyoming for Defendants-Appellees.

Before **HENRY**, **ANDERSON**, and **MURPHY**, Circuit Judges.

**HENRY**, Circuit Judge.

Kathleen Brockman sued her former employer, the Wyoming Department of Family Services ("DFS"), and several employees of DFS in their individual and official capacities, claiming violations of various federal statutes and asserting state tort claims. Ms. Brockman appeals parts of the district court's order granting the defendants' motions for summary judgment on all of her claims. We exercised jurisdiction under 28 U.S.C. § 1291 and abated her appeal pending the Supreme Court's decision in *Nevada Dep't of Human Resources v. Hibbs*, 123 S. Ct. 1972 (2003). We now affirm.

## I. BACKGROUND

Ms. Brockman worked full-time for DFS as a day-care licensor beginning in March of 1992. She received favorable job performance evaluations through 1996. During 1996, the manager of the office out of which Ms. Brockman worked allegedly began spreading rumors about Ms. Brockman's mental instability and accusing Ms. Brockman of being a lesbian. The manager apparently approached Ms. Brockman's supervisors with complaints regarding Ms. Brockman, and in the following months a number of meetings occurred at which Ms. Brockman alleges she was targeted for unfair treatment by her supervisors. Starting in early 1997, Ms. Brockman began to receive negative job evaluations, and in response she filed multiple grievances objecting to the evaluations. Further, problems ensued as Ms. Brockman and her supervisors engaged in discussions, short-lived agreements, warnings and hostile exchanges.

In March of 1998, Ms. Brockman received a "needs improvement" evaluation. That year, Ms. Brockman suffering the symptoms of post-traumatic stress disorder, the

onset of which was allegedly triggered by the hostility of her supervisors. She later began seeing a counselor for depression, anxiety, and other physical symptoms.

During 1997 and 1998, Ms. Brockman had taken paid sick leave on a number of occasions. In a letter dated March 10, 1998, Ms. Brockman received notice that DFS was retroactively designating the paid sick leave that she had taken between February 10 and 27, 1998 as leave taken pursuant to the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 *et seq.* ("the FMLA"). DFS later retroactively counted an additional six weeks of leave towards Ms. Brockman's annual allowance of twelve weeks of FMLA leave. In January 1999, DFS informed Ms. Brockman that she had used her entire 12 weeks of FMLA leave and would have to work another 12–month period beginning January 22, 1999 to qualify for more leave time.

In February 1999, Ms. Brockman was suspended without pay for ten days for improper use of e-mail. At the end of that suspension, Ms. Brockman did not return to work. Instead she notified DFS that she wished to take another twelve weeks of FMLA leave to treat the symptoms of her stress disorder. Allegedly, Ms. Brockman had on two occasions communicated to her supervisors her therapist's opinion that between one and three months of leave would allow her to recover and return to work. *See* Aplt's Reply Br. at 10. On April 19, 1999, DFS sent Ms. Brockman notice of its plan to terminate her employment, and she was terminated on May 17, 1999.

Ms. Brockman retained counsel and received a hearing before a Hearing Examiner in the Wyoming's Office of Adminstrative Hearings. The Examiner determined on summary judgment that DFS had established good cause for firing Ms. Brockman as required under state law. *See* Wyo. Stat. Ann. § 9-2-1019 (a)(iii) (Michie 2003).

Ms. Brockman did not appeal the result of her administrative hearings. She filed suit in federal district

against the State of Wyoming[1] and the DFS employees allegedly involved in creating the conditions that led to the onset of her symptoms and her firing, asserting a variety of claims under federal and state law. The district court granted the defendants' motion for summary judgment on all claims and awarded costs to the defendants.

Ms. Brockman appeals the following rulings by the district court: (1) dismissal, on the basis of collateral estoppel, of her claim for interference with, and denial of, medical leave under the self-care provision of the FMLA; (2) dismissal of her claim under the Rehabilitation Act that DFS failed to accommodate Ms. Brockman's disability and committed wrongful discharge; and (3) dismissal of Ms. Brockmans' pendent state tort claim against the individual defendants for intentional infliction of emotional distress. Ms. Brockman also argues that sovereign immunity does not bar her claims under either the FMLA or the Rehabilitation Act. Finally, Ms. Brockman argues that is was "unconscionable" for the district court to award costs against her.

## II. ANALYSIS

The district court granted summary judgment for the defendants on all of Ms. Brockman's claims. We review the grant of summary judgment de novo. *Goldsmith v. Learjet, Inc.*, 90 F.3d 1490, 1493 (10th Cir. 1996). Summary judgment is appropriate only if "there is no genuine issue as to any

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[1] In her complaint, Ms. Brockman named the State of Wyoming as a defendant, but she did not name DFS separately. She did, however, identify the action as being brought against "Defendant State of Wyoming's Department of Family Services." Aplt's App. at 1 (Second Amended Complaint, filed Mar. 23, 2001). In this appeal, DFS is a named defendant, but not the state. For the purposes of this appeal, therefore, we recognize that DFS is a subdivision of the State of Wyoming and refer to each entity as is appropriate, "DFS" or "State."

material fact and . . . the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c).

We analyze below each of the four substantive issues that Ms. Brockman raises on appeal: (1) FMLA claims, (2) Rehabilitation Act claims, (3) state tort claims, and (4) the award of costs to the defendants. Because state sovereign immunity is a threshold jurisdictional issue, we must address it first when it is asserted by a defendant. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (rejecting the doctrine of hypothetical jurisdiction and instructing that challenges to Article III jurisdiction-must be resolved before a panel may address the merits of the underlying claims). For the FMLA and Rehabilitation Act claims, we therefore first consider the State's assertion of sovereign immunity before proceeding to the merits of each issue.[2]

As we discuss below, because we conclude that Ms. Brockman's FMLA claims against DFS is barred, we do not reach the merits of that claim. We do, however, consider her FMLA claim against the named individual defendants and her claim against the State for reinstatement. Similarly, we must consider whether the State is protected by sovereign immunity against claims under the Rehabilitation Act. Concluding that the State waived its immunity, we consider Ms. Brockman's challenge to the merits of the district court's ruling on those claims. We then consider the district court's ruling on Ms. Brockman's state tort claim. Finally, we consider the award of costs to the defendants.

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[2] Although the parties and the district court characterize discussion of sovereign immunity as Eleventh Amendment claims, the Supreme Court has made clear its view that state sovereign immunity is not grounded in that amendment. *See Alden v. Maine*, 527 U.S. 706, 713 (1999) ("'Eleventh Amendment immunity' . . . is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment.")

A. Family and Medical Leave Act (FMLA) Claims

The district court held that Ms. Brockman's FMLA claims against all defendants were barred by collateral estoppel, reasoning that the results of the administrative hearing precluded the same issues from being retried in a federal court. We consider first the threshold question of whether Ms. Brockman's claims are barred by sovereign immunity and conclude that sovereign immunity is a bar only to Ms. Brockman's FMLA claims against DFS. Accordingly, we then address, and ultimately affirm, the district court's grant of summary judgment based on collateral estoppel.

Sovereign Immunity

The Family and Medical Leave Act authorizes qualified employees to take leave from their jobs in certain circumstances. Three of the four categories of eligibility relate to the care of family members: birth and care of a child, *see* 29 U.S.C. § 2612 (a)(1)(A), adoption or foster care of a child, *see* § 2612(a)(1)(B), and care for a spouse, child or parent who has a serious health condition, *see* § 2612(a)(1)(C). The final category is not directly related to the care of family members, allowing leave "[b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee." § 2612(a)(1)(D).

In *Hibbs*, the Supreme Court addressed whether the FMLA's third provision, for care of a close family member, validly abrogated states' sovereign immunity. *See* 123 S. Ct. at 1977-84. In concluding that § 2612(a)(1)(C) was a valid abrogation of sovereign immunity, the court focused exclusively on the gender discrimination that motivated Congress's enactment of the FMLA. *See, e.g., id.* at 1979 (describing the pre-existing state leave policies as being attributable to "the pervasive sex-role stereotype that caring for family members is woman's work"); *id.* at 1983 ("[S]tate practices continue to reinforce the stereotype of women as caregivers."). Accordingly, the Court's holding rested

squarely on the "heightened level of scrutiny" afforded gender discrimination, *id.* at 1982, requiring that congressional remedies be narrowly targeted to alleviate the effects of such discrimination. *See id.* at 1983 ("The FMLA is narrowly targeted at the fault line between work and family--precisely where sex-based overgeneralization has been and remains strongest.")

Because the Supreme Court's analysis in *Hibbs* turned on the gender-based aspects of the FMLA's § 2612(a)(1)(C), the self-care provisioin in subsection (D) is not implicated by that decision. The legislative history accompanying the passage of the FMLA reveals two motivations for the inclusion of the self-care provision. First, Congress was attempting to alleviate the economic burdens to both the employee and to his or her family of illness-related job-loss. *See* S. Rep. No. 103-3, at 11 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 13-14; H.R. Rep. Np. 101-28(I), at 23 (1990). Second, Congress was attempting to prevent those with serious health problems from being discriminated against by their employers. *See* S. Rep. No. 103-3, at 12; H.R. Rep. 101-28(I), at 23. The legislative history does not, however, identify as the basis for subsection (D) a link between these two motivations and any pattern of discriminatory stereotyping on the part of the states as employers.

There is a colorable argument to the effect that the self-care provision of the FMLA must be viewed as part of the Act as a whole, and that it would therefore be a valid abrogation of states' sovereign immunity. *See Laro v. New Hampshire*, 259 F.3d 1, 17 (1st Cir. 2001) (Lipez, J., dissenting). We decline to adopt that view here, because "[e]ven with the heightened standard of review for gender-based discrimination, . . . we do not find that the legislative history sufficiently ties the FMLA's personal medical leave provision to the prevention of gender-based discrimination." *Id.* at 11

(majority opinion).[3] Moreover, "[t]here is no showing . . . that establishes any nexus between gender-neutral medical leave for one's own health conditions and the prevention of discrimination on the basis of gender *on the part of states as employers*." *Id.* at 13-14 (emphasis in original).

We thus hold that through subsection (D) Congress did not effect a valid abrogation of state sovereign immunity. Sovereign immunity does not, however, bar suits for money damages against employees of a state, *see Alden*, 527 U.S. at 757, nor does it bar claims for injunctive relief. *See Bd. of Tr. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 n.9 (2001). We therefore consider the district court's ruling as it relates to those claims.

Preclusive Effect of the State Administrative Hearing

The administrative hearing officer found that Ms. Brockman was fired for cause. In particular, in findings cited

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[3] Although they have ruled on a variety of grounds, at least seven other circuits have held that either subsection (D) alone or the entire FMLA violates sovereign immunity. Some of these decisions have been overruled by *Hibbs* with respect to subsection (C), but the invalidation of the self-care provisions in subsection (D) stands. *See Lizzi v. Alexander*, 255 F.3d 128, 136 (4th Cir. 2001) (the self-care provisions of the FMLA do not contain a valid abrogation of state sovereign immunity); *Townsel v. Missouri*, 233 F.3d 1094, 1095 (8th Cir. 2000) (no section of the FMLA contains a valid abrogation of state sovereign immunity), *overruled in part by Hibbs*, 123 S. Ct. at 1984; *Chittister v. Dep't of Cmty. and Econ. Dev.*, 226 F.3d 223, 229 (3d Cir. 2000) (same), *overruled in part by Hibbs*, 123 S. Ct. at 1984; *Kazmier v. Widmann*, 225 F.3d 519, 526-27, 529 (5th Cir. 2000) (neither subsection (C) nor subsection (D) of § 2612(a)(1) constitute a valid abrogation of state sovereign immunity), *overruled in part by Hibbs*, 123 S. Ct. at 1984; *Sims v. Univ. of Cincinnati*, 219 F.3d 559, 566 (6th Cir. 2000) (the entire FMLA is not a valid attempt by Congress to abrogation state sovereign immunity), *overruled in part by Hibbs*, 123 S. Ct. at 1984; *Hale v. Mann*, 219 F.3d 61, 69 (2d Cir. 2000) (subsection (D) of § 2612(a)(1) not a valid abrogation of state sovereign immunity); *Garrett v. Univ. of Ala. Bd of Trs.*, 193 F.3d 1214, 1219 (11th Cir. 1999) (self-care provisions not a valid abrogation of sovereign immunity), *rev'd in part on other grounds*, 531 U.S. 356 (2001).

by the district court, Aplt's App. at 629 (Dist. Ct. Order, filed May 10, 2001), the hearing officer noted that "no medical evidence was submitted to DFS, nor to this Office, that supports Brockman's contention that she would have been able to return to work but for the improper FMLA leave calculation." Aplt's App. at 468 (Administrative Hearing Order Granting Summary Judgment, dated Dec. 30, 1999). Instead, the hearing officer found that "the evidence from Brockman's testimony, as well as her psychiatrist, shows that Brockman was incapacitated and unable to return to work from February 19, 1999 through August 17, 1999, well beyond the 90 days allowed by the FMLA." *Id.* Also "Brockman submitted no evidence . . . that her FMLA leave was improperly calculated." *Id.* As noted above, Ms. Brockman did not appeal the hearing officer's decision.

As the district court correctly concluded, the hearing officer's decision is preclusive so long as the Wyoming courts themselves would give it preclusive effect. *See Univ. of Tenn. v. Elliott,* 478 U.S. 788, 799 (1986). The Wyoming Supreme Court has stated that "since administrative agency decisions deal primarily with issues rather than with causes of action or claims, collateral estoppel is the appropriate preclusion doctrine to be applied to final administrative agency decisions. The collateral estoppel doctrine prevents relitigation of issues which were involved actually and necessarily in a prior action between the same parties." *Kahrs v. Bd. of Trs. for Platte County Sch. Dist. No. 1*, 901 P.2d 404, 406 (Wyo. 1995) (reviewing the finality of an administrative hearing when the losing party did not appeal the administrative hearing's outcome) (internal citation omitted).

The United States Supreme Court has "long favored application of the common-law doctrines of collateral estoppel (as to issues) and res judicata (as to claims) to those determinations of administrative bodies that have attained finality." *Astoria Fed. S&L Assoc. v. Solimino*, 501 U.S. 104, 107 (1991). Some federal statutory schemes abrogate this

federal common-law rule. *See id.* at 110 (ADEA); *Elliott*, 478 U.S. at 799 (Title VII).

The Wyoming Supreme Court has stated that four factors should be analyzed in this inquiry:

> (1) whether the issue decided in the prior adjudication was identical with the issue presented in the present action; (2) whether the prior adjudication resulted in a judgment on the merits; (3) whether the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication; and (4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding.

*Kahrs*, 901 P.2d at 406. All four of these requirements are met here: the issue is identical, the hearing officer issued a judgment on the merits of the factual claims, Ms. Brockman was a party, and she was given a full and fair opportunity to litigate her claim.

Addressing similar concerns, the United States Supreme Court has also held that an administrative decision must satisfy three fairness requirements: 1) the agency must have been acting in a judicial capacity; 2) it must be resolving issues that are properly before it; and 3) the parties must have an adequate opportunity to litigate those issues before the agency. *See United States v. Utah Const. & Mining Co.*, 384 U.S. 394, 422 (1966).

The district court found that "the hearing examiner engaged in a thorough and far reaching examination of Brockman's claims arising from her discharge." Aplt's App. at 629. Ms. Brockman was represented by counsel at the administrative hearing, she raised numerous issues, and the agency provided an opportunity for discovery. Further, the officer conducting the hearing ruled with respect to Ms. Brockman's claims. We therefore see no reason to question the district court's conclusion that the administrative hearing

comported with judicial standards, and we conclude that the agency was acting in a judicial capacity.

Similarly, we find no reason to doubt that the second and third factors are satisfied, i.e., that the hearing officer was resolving issues of fact properly before it and that Ms. Brockman had an adequate opportunity to litigate those issues. *Cf. Atiya v. Salt Lake County*, 988 F.2d 1013, 1019 (10th Cir. 1993) (concluding that the parties at a similar administrative proceeding were given an adequate opportunity to litigate the issues, noting that both parties "were represented by counsel, opening and closing statements were made, witnesses were examined and cross-examined, exhibits introduced, and . . . the hearing itself extended over some six days").

Ms. Brockman argues that the hearing officer incorrectly interpreted the FMLA's requirements and asserts that the hearing officer is inherently biased by virtue of serving at the pleasure of the governor. If Ms. Brockman believed that the hearing officer was biased, however, she should have exercised her right to appeal the ruling to the state district court. She did not do so. She argues that she "fell into a deep depression" because of the hearing officer's rulings against her and that, because her union attorney could no longer represent her, she was unable to appeal the decision against her. Aplt's Br. at 21-22. Ms. Brockman cites *Murdock v. Ute Indian Tribe*, 975 F.2d 683, 689 (10th Cir. 1992), for the proposition that courts should look at the "nature and relationship of the parties" in assessing whether a party had a full and fair opportunity to litigate. Aplt's Br. at 45. Given the facts described above, however, we see nothing in the nature and relationship of these parties that would bring into doubt the fullness or fairness of Ms. Brockman's opportunity to litigate her claims.

Ms. Brockman's principal argument on appeal, however, is that the hearing officer cannot adjudicate matters of federal law. She notes that "preclusive effect is given to the determination of factual issues by an administrative hearing

officer, not the examiner's interpretation of federal law." Aplt's Br. at 26-27. As noted above, the hearing officer concluded that "[Ms.] Brockman submitted no evidence that her FMLA leave was improperly calculated." Aplt's App. at 468. Ms. Brockman argues that the hearing officer's findings of fact are not facts at all, because "[i]n order to determine whether Ms. Brockman's leave was improperly calculated or not, she had to have interpreted the language of the FMLA regarding leave requirements." Aplt's Br. at 27. To the extent that Ms. Brockman is arguing that the hearing officer's finding of a lack of evidence was only possible if the hearing officer had interpreted the FMLA, this is incorrect. A hearing officer can discern a lack of evidence without making a legal ruling. Furthermore, when the hearing officer noted that the evidence presented showed that Ms. Brockman would not have been able to return to work until August 17, 1999, the hearing officer's observation that this date is "well beyond the 90 days allowed by the FMLA," Aplt's App. at 468, was not a legal interpretation.

We therefore hold that Ms. Brockman's FMLA claims that are not precluded by state sovereign immunity are barred by collateral estoppel. The hearing officer's factual findings, which have preclusive force, leave Ms. Brockman unable to prove liability on the part of any defendants. She was fired for cause, she did not present evidence to support her claims, and she did not appeal the administrative ruling to that effect.

B. Rehabilitation Act Claim

In ruling on Ms. Brockman's claims under § 504 of the Rehabilitation Act, 29 U.S.C. § 794, the district court ruled that the State had waived its immunity but that Ms. Brockman was not covered by the terms of the Rehabilitation Act. We once again consider first the sovereign immunity issue and then the merits.

Sovereign Immunity

In *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985), the Supreme Court ruled that the Rehabilitation Act

was not a valid abrogation of the states' sovereign immunity because the Act lacked clarity. In response, Congress passed 42 U.S.C. § 2000d-7(a)(1), which explicitly states that "[a] state shall not be immune . . . from suit in Federal court for a violation of Section 504 of the Rehabilitation Act of 1973." We agree with the district court that "any State reading [42 U.S.C. § 2000d-7(a)(1)] would clearly understand that, by accepting . . . funding, it was consenting to resolve disputes regarding alleged violations of the Act's anti-discrimination provisions in federal court." Aplt's App. at 636 (quoting *Bell Atlantic MD, Inc. v. MCI WorldCom, Inc.*, 240 F.3d 279, 292 (4th Cir. 2001)), *vacated in part on other grounds*, *Verizon Md., Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635 (2002). The state asserts that such waiver must be clearly expressed, but it offers no argument that it did not clearly waive its sovereign immunity. The federal circuits that have considered this issue have uniformly held that "by accepting federal financial assistance as specified in 42 U.S.C. § 2000d-7, states and state entities waive sovereign immunity from suit." *Robinson v. Kansas*, 295 F.3d 1183, 1189-90 (10th Cir. 2002) (collecting cases). Section 2000d-7 provides clear notice, and a state retains its authority to decline federal funds. An affirmative choice to apply for, and accept, funds thus serves as an express waiver of immunity.

Therefore, while Congress may not require states to litigate disability claims in federal court, *see Garrett*, 531 U.S. at 374, Congress may induce states to waive their immunity. We agree with the district court that "[b]y accepting Rehabilitation Act monies, the State of Wyoming has made itself amenable to suit." Aplt's App. at 636.

"Qualified Individual"

The district court ruled that the Rehabilitation Act provides no cause of action against individual supervisors and that DFS was not liable due to Ms. Brockman's inability to perform the essential functions of the job. Specifically, the district court found that Ms. Brockman was not a "qualified individual" under the Rehabilitation Act, which prohibits

discrimination against an "otherwise qualified individual with a disability." 29 U.S.C. § 794.

To determine whether Ms. Brockman is a qualified individual, we employ a two part test: (1) whether the individual can perform the "essential function" of the job, and (2) if not, whether a reasonable accommodation would allow the individual to perform those essential functions. *See Wells v. Shalala*, 228 F.3d 1137, 1144 (10th Cir. 2000). The hearing officer had determined that Ms. Brockman was unable to be in attendance at her job at least until August 17, 1999. "Attendance is generally an 'essential' function of any job." *Cisneros v. Wilson*, 226 F.3d 1113, 1129 (10th Cir. 2000), *overruled on other grounds*, *Garrett*, 531 U.S. 356. Because there is no way to accommodate an employee's inability to be in attendance, the district court concluded that "no reasonable accommodation was available." Aplt's App. at 643.

Ms. Brockman states accurately that the relevant question is whether she was able to return to work at the time of the adverse employment action. *See* Aplt's Br. at 55 (quoting *Cisneros*, 226 F.3d at 1129). However, as the hearing officer stated, Ms. Brockman "never notified DFS that she was able to return to work prior to her termination." Aplt's App. at 468. "An employer is not required to wait indefinitely" for an employee to recover. *Smith v. Blue Cross Blue Shield of Kan., Inc.*, 102 F.3d 1075, 1077 (10th Cir. 1996). Although Ms. Brockman asserts that she had at that point requested only a one-to-three month leave, the hearing officer's unappealed factual finding that Ms. Brockman had provided no evidence that she would be able to return to work is dispositive.

We therefore adopt the district court's analysis of the Rehabilitation Act claim. Because DFS had good reason to believe at the point that it terminated Ms. Brockman that she might never return to work, Ms. Brockman was not a "qualified individual" under the terms of that Act.

C. State Tort Claim

Ms. Brockman also appeals the dismissal of her claim against the individual defendants for intentional infliction of emotional distress. The district court ruled that this claim was barred because the Wyoming Governmental Claims Act (WGCA), Wyo. Stat. Ann. § 1-39-101 (Michie 2003) *et seq.*, immunizes the state and its employees from tort liability. Discussing the tort of intentional infliction of emotional distress, the Wyoming Supreme Court has held that "[t]here is nothing in any section of the [WGCA] . . . which would serve to abrogate sovereign immunity for these claims." *Routh v. State*, 952 P.2d 1108, 1116 (Wyo. 1998).

Ms. Brockman argues that public employees acting outside the scope of their duties are not immune from suit. *See Jung-Leonczynska v. Steup*, 782 P.2d 578, 582 (Wyo. 1989) (holding that the scope of duties is "normally [a question] for the trier of fact and becomes one of law when only one reasonable inference can be drawn from the evidence"). Ms. Brockman argues that personally harassing an employee about their perceived sexual preference and hounding them with negative employee evaluations is not within anyone's scope of duties. The defendants reply that any such harassment "was simply supervising state employees doing their job as a manager," Aples' Br. at 22, because "[t]he complained of conduct was requiring Appellant Brockman basically to do her job." *Id.*

We hold that the acts alleged by Ms. Brockman, even if true, were within the scope of duties of the various DFS employees. While Ms. Brockman might believe that the individual defendants had ill intent in filing negative employment reports and making adverse decisions about her leave time, these are the routine actions of employee management and thus fall comfortably within the scope of their duties. The district court was therefore correct in holding that the WGCA bars Ms. Brockman's state tort claim against the individual defendants.

D. Award of Costs

Having ruled against Ms. Brockman on all counts, the district court awarded costs to the defendants. We review the district court's award of costs for abuse of discretion. *See Marathon Ashland Pipe Line LLC v. Md. Cas. Co.*, 243 F.3d 1232, 1254 (10th Cir. 2001). Under 28 U.S.C. § 1920, "[a] judge or clerk of any court of the United States may tax . . . costs." Likewise, "[e]xcept when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs." Fed. R. Civ. P. 54(d)(1).

Ms. Brockman does not argue that the district court abused its discretion; rather, she argues that "it is inhumane to demand more of her than the pound of flesh, in the form of her mental and physical health, that Defendants have already taken." Aplt's Br. at 61. Her brief concludes: "The District Court's award of costs to the Defendants should be reversed, not because the award violates the law, but simply because it is an unconscionable injustice." *Id.* Because Ms. Brockman neither explains how the award of costs constitutes such an injustice nor shows how it was an abuse of the district court's discretion, we affirm the award of costs.

## III. CONCLUSION

For the reasons discussed above, we AFFIRM the district court's grant of summary judgment on all claims and its award of costs to the defendants.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF WYOMING**

FILED
DISTRICT OF WYOMING
CHEYENNE
2001 May – 9 AM 11:18

CLERK
U.S. DISTRICT COURT

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| KATHLEEN BROCKMAN | ) | RECEIVED |
| | ) | MAY 10, 2001 |
| Plaintiff, | ) | BY _____ |
| v. | ) | |
| | ) | |
| WYOMING DEPARTMENT | ) | |
| OF FAMILY SERVICES and | ) | |
| GLENDA LACEY, LES | ) | |
| POZSGI, MERIT THOMAS, | ) | |
| ROBERT KUCHERA, | ) | Case No. 00-CV-087-B |
| SHIRLEY CARSON, DANA | ) | |
| WARD, each in his/her | ) | |
| employment capacity with the | ) | |
| Defendant | ) | |
| DEPARTMENT OF FAMILY | ) | |
| SERVICES individually, | ) | |
| | ) | |
| Defendants. | ) | |

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**ORDER**

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This matter comes before comes before the Court on Plaintiff's claims against the Defendants pursuant to Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990, 42 U.S.C. §1983, the Family Medical Leave Act, and pendent state law claims. This is an

order on Defendants' Motion for Summary Judgment, Supplemental Motion for Summary Judgment, and Plaintiff's Motion for Summary Judgment on Family Medical Leave Act Claims. After considering the motions, hearing oral arguments, and being fully advised of the premises, this Court **FINDS** and **ORDERS** as follows:

## Background

Plaintiff Kathleen Brockman ("Brockman") was employed by the Wyoming Department of Family Services ("DFS") from 1992 through May 19, 1999. She was responsible for licensing day care facilities on behalf of the Department of Family Services, working out of her home and the DFS office in Rock Springs, Wyoming. Problems began in 1996. [1]

Plaintiff claimed to have misunderstandings with a new office manger, Dana Ward, which resulted in the two coming to a "grievance resolution." Under this agreement, Ward and Brockman would meet weekly to discuss any problems before reporting any workplace complaints to DFS headquarters in Cheyenne, Wyoming. During one of these meetings on February 21, 1997, Ward allegedly said she thought Plaintiff was gay, which Plaintiff denies. After this episode, Ward complained about Brockman to her supervisors in Cheyenne.

Plaintiff began receiving negative work evaluations from her supervisor, Glennda Lacey, in March, 1997. Plaintiff filed a grievance. A meeting was scheduled for April 22, 1997 in Cheyenne to discuss Brockman's grievance with her supervisor, Lacey, and other DFS staff. During the second day of this meeting, Brockman alleges Robert Kuchera, a deputy director at DFS, swore he would "get her," and Brockman contends this was due to Ward's accusations that Brockman was gay.

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[1] During her career at DFS, Brockman filed over seventy grievances and complaints, none of them successful.

After this meeting, Plaintiff alleges she was singled out by directives which applied to no other similarly situated employee, such as forbidding her from working in the Rock Springs office after hours or on weekends, and prohibiting her from sending e-mails to supervisors. Brockman admits these actions were not "tangible employment actions" but maintains they were "intimidating and embarrassing." (Pl.'s Second Amend. Compl. ¶ 27.)

On April 28, 1997, Plaintiff was warned by Kuchera about frivolous use or abuse of the grievance process. Plaintiff filed a sexual harassment grievance against Ward anyway, and alleges she was subjected to "retaliatory actions" afterward.

Beginning May 6, 1997, Plaintiff experienced physical problems which she contends were caused by emotional pressure from her confrontations with supervisors. Brockman then began having difficulties with supervisors over her use of sick leave. Brockman alleges the sick leave disagreements were in retaliation for her sexual harassment claims. She also alleges she was harassed through anonymous negative surveys from day care providers, and bad work ratings. In March, 1998, Brockman received a Performance Appraisal Report which gave her a "needs improvement" rating, and she alleges it had the effect of excluding her from bonuses and raises.

From February 1998 to February 23, 1999, Plaintiff contends she was denied sick leave to which she was entitled. Every time she took sick leave, Lacey required Brockman to provide documentation from her physician. On March 10, 1998, Brockman was notified that time off of more than three days for a serious health condition had to be deducted from her allotment under the Family Medical Leave Act ("FMLA"). Brockman's absence from work from February 10, 1997 through February 27, 1997 was retroactively deducted from her allotted leave under the FMLA.

On March 19, 1998, Brockman was suspended for violating rules requiring her to report absences. She was suspended again on June 6, 1998 for missing work as well as working during her prior suspension. Brockman received another suspension on August 10, 1998 for ninety days with pay for improper and intimidating conduct towards day care providers. Returning from her suspension on November 9, 1998, Brockman was assigned to a new supervisor, Les Pozsgi.

After returning from her suspension, Plaintiff alleges that she was prevented from catching up on her workload by Pozsgi. Brockman also contends he denied her request for reasonable accommodation of her condition (Post Traumatic Stress Disorder) which she says required her to take two hour lunch breaks. Brockman was suspended again on February 4, 1999, for two weeks, allegedly for complaining to superiors via e-mail.

Brockman was notified by DFS on January 22, 1999 that she had used all available leave under the FMLA as of November 12, 1998, and that she would not be eligible for additional FMLA leave until November 12, 1999. Plaintiff contends she actually had five days and fifteen minutes of FMLA leave as of February 4, 1999. On February 19, 1999, Brockman formally requested and was denied extended sick leave under the FMLA. Instead she was place on leave without pay or benefits. Pozsgi informed Brockman that her annual and paid sick leaves would run out on March 1, 1999.

On March 1, Brockman had not returned to work, and DFS stopped paying her health insurance premiums. Kuchera requested Brockman provide additional medical certification of her condition, and submit to examination by a psychologist in Evanston. Brockman supplied a letter from her doctor, but refused to drive to the psychologist. Brockman was notified of DFS's intent to terminate her on April 19, 1999, and was officially terminated on May 17, 1999.

Brockman brings claims for Title VII gender discrimination ("Count One"); actionable retaliation for making a Title VII claim ("Count Two"); failure to accommodate her disability and wrongful discharge under the ADA and the Rehabilitation Act ("Counts Three and Four"); a claim under §§1983, 1985 and 1988 for denial of her due process and property rights ("Count Five"); interference with and denial of medical leave under the FMLA ("Count Six"); and pendent state law claims for tortuous interference with quasi-contract, and intentional infliction of emotional distress ("Count Seven").

## I. Defendants' Motion for Summary Judgment and Supplemental Summary Judgment

### A. Res Judicata and Collateral Estoppel

Defendants argue that the issues and underlying facts raised in Brockman's claim have already been conclusively determined in administrative hearings following her discharge, and Brockman is precluded from asserting claims now which could have been raised then. For the following reasons, the Court finds Brockman is precluded by a prior administrative hearing from bringing her FMLA, §1983, and tortious interference claims.

"[A] losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise." Astoria Fed. Sav. and Loan Ass'n v. Solimino, 501 U.S. 104, 107 (1991). The Tenth Circuit recognizes state law application of res judicata (claim preclusion) and collateral estoppel (issue preclusion). Slavens v. Uinta County, 1993 WL 307906 (10th Cir. 1993).

Under Wyoming law, findings of fact and conclusions of law reached by a hearing examiner adjudication a plaintiff's administrative appeal of his firing are conclusive with regards to the plaintiff's court claim of wrongful discharge. Univ. of Wyoming v. Gressley, 978 P.2d 1146 (Wyo. 1999) . In Gressley, issue preclusion barred relitigation of whether a

university professor's dismissal for cause was proper. Id. at 1153. The professor could not bring a subsequent breach of contract claim, where he had received full and fair opportunity to litigate identical issues in the university's dismissal proceedings, he chose not to seek judicial review of the university's decision, and the parties to both sets of proceedings were identical. Id.

The federal statute that give preclusive effect to state court decisions, 28 U.S.C. §1738, does not confer the same preclusive effect on administrative fact-finding by a state agency that has not been reviewed by a state court. Univ. of Tennessee v. Elliott, 478 U.S. 788, 794 (1986). Whether such preclusive effect is available depends on whether Congress, in creating a federal cause of action, intended to create an exception to the general rules of preclusion. Id. at 796-97.

This was clearly the case with the adoption of Title VII. Congress created a federal fact-finding entity, the Equal Employment Opportunity Commission, which is to give "substantial weight," rather than preclusive effect, to state administrative findings. Id. at 795. Congress also gave Title VII claimants an entitlement to trial de novo, even after administrative hearings. Id. Therefore, "Congress did not intend unreviewed state administrative proceedings to have preclusive effect on Title VII claims." Id. at 796. This same reasoning applies to the role of administrative factual conclusion in ADA and Rehabilitation Act claims, since both contain provisions analogous to Title VII. See Pernice v. City of Chicago, 237 F.3d 783, 787 (7th Cir. 2001) (ADA); Thomas v. Contoocook Valley Sch. Dist., 150 F.3d 31, 39 (1st Cir. 1998) (ADA); Prewitt v. U.S. Postal Service, 662 F. 2d 292, 303 (5th Cir. 1980) (Rehabilitation Act); Wali v. U.S., 871 F.2d 1540, 1546 (10th Cir. 1989) (Rehabilitation Act).

However, the same does not hold true for Brockman's §1983 claim. While deciding that unreviewed administrative factfinding had no preclusive effect in the Title VII context, the Elliott court also held that "[n]othing in the language of §1983 remotely expresses any congressional intent to

contravene the common-law rules of preclusion." Id. at 797 (quoting Allen v. McCurry, 449 U.S. 90, 97-98 (1980)). "[A] federal district court in a proceeding under 42 U.S.C. §1983 must give a state agency's factfinding the same preclusive effect to which it would be entitled in the state's court if the state agency while acting in a judicial capacity resolved disputed issues of fact properly before it and the parties had an adequate opportunity to litigate the issues in dispute." Saavedra v. City of Albuquerque, 73 F.3d 1525, 1534, (10th Cir. 1996) (citation and quotation omitted).

On this basis, Brockman's FMLA claim is also subject to preclusion by the hearing examiner's findings. Brockman cites case authority which notes general similarities between the FMLA, Title VII and the ADA [2] which recognizes a right to jury trial under the FMLA[3] Neither case is dispositive of the issue presented here.

The provisions of the FMLA, 29 U.S.C.A. § 2601, et seq., do not evince an intent on the part of Congress to deny preclusive effect to the findings of state administrative agencies. The FMLA does not create a federal administrative agency. While it may confer a right to jury trial, it does not require that such a trial be de novo. As Elliott holds, preclusion is the rule, and acts of Congress are not presumed to automatically create exceptions. Elliott, 478 U.S. at 796-97.

To the extent a prior determination has a preclusive effect, the scope of such preclusion is determined by the quality of decisionmaking in the administrative forum. "In order for state administrative fact finding to be given a preclusive effect in a subsequent judicial proceeding, the state agency must not only be acting in a judicial capacity, it must resolve disputed issues of fact properly before it." Slavens,

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[2] See Churchill v. Star Enter., 183 F.3d 184, 193 (3rd Cir. 1999).

[3] See Frizzell v. Southwest Motor Freight, 154 F.3d 641 (6th Cir. 1998).

1993 WL 307906 at *5 (10th Cir. 1993) (quoting Elliott, 478 U.S. at 798).

A review of the record indicates the hearing examiner engaged in a thorough and far reaching examination of Brockman's claims arising from her discharge. (Ex. O, Def.'s Memo. of Law in Supp. of Mot. for Summ. J.) An administrative proceeding of a "quasi-judicial nature" with conclusions of "less than ideal clarity" is not given preclusive effect. Scroggins v. State of Kansas, 802 F.2d 1289, 1293 (10th Cir. 1986). Such was not the case here, however.

In particular, the hearing examiner made explicit findings regarding the apportionment of Brockman's FMLA leave. Among the examiner's Findings of Fact, she noted:

> [N]o medical evidence was submitted to DFS, nor to this Office, that supports Brockman's contention that she would have been able to return to work but for the improper FMLA leave calculation. To the contrary, the evidence from Brockman's testimony, as well as her psychiatrist, shows that Brockman was incapacitated and unable to return to work from February 19, 1999 through August 17, 1999, well beyond the 90 days allowed by the FMLA. Additionally, Brockman submitted no evidence supporting her argument that her FMLA leave was improperly calculated.
>
> (Ex. O, supra, at 4.)

As a matter of law, the examiner determined Brockman "was incapable of performing her duties well after all available leave time had been exhausted," and DFS followed all procedures and personnel rules in dismissing her. (Id.)

These findings are similarly dispositive of Brockman's state law claim for contractual interference and breach of

contract.[4] The hearing examiner indicated that Brockman's discharge was proper and was consistent with department procedures. Therefore, her discharge cannot be attributed to interference on the part of Brockman's supervisors. Brockman is precluded from claiming the actions of the individual Defendants interfered with her employment status at DFS. The hearing did not address, and therefore does not preclude, Brockman's emotional distress claim.

Brockman claims her disability prevented her from adequately presenting her case at the hearing, so she did not have a full and fair opportunity to present her case at hearing. This argument lacks merit. Prior to hearing, Brockman informed the Office of Administrative hearings that she could not participate due to "emotional instability." (Ex. O at 2.) Proceedings were delayed, Brockman obtained the assistance of counsel, and a hearing was set after Brockman indicated she was able to continue. (Id.) In light of this accommodation, Brockman cannot now claim her case was hampered due to her condition.

Brockman also argues that her claims against the individual Defendants were not presented before the hearing officer. As stated above, claims are precluded where the earlier adjudication involved the same party or a party in privity. Gressley, supra; Kahrs v. Bd. of Trustees, 901 P.2d 404, 406 (Wyo. 1995). But Brockman cannot explain how the absence of the individual Defendants changed the complexion of the administrative hearing in terms of Brockman's FMLA and §1983 claims. The hearing examiner found Brockman was not improperly denied FMLA leave, and DFS did not depart from its procedures in dismissing her. Because the administrative judgment operated against

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[4] The Court notes that in her voluminous filings, Brockman has not demonstrated the existence of an employment contract with the State of Wyoming, nor any enforceable agreement between herself and Defendant Ward.

Brockman, the question is whether she is bound by it in this civil suit. The Court believes she is.

The findings of the administrative hearing conclusively show that Brockman was not impermissibly denied leave time or benefits to which she was entitled under the FMLA. The findings also establish that in dismissing Brockman for good cause, she was not deprived of due process, equal protection,[5] or a cognizable property right in continued employment with DFS,[6] as would provide the basis for claims under §§1983, 1985, or 1988. As a result, this Court cannot allow her to relitigate those issues here.

Therefore, Counts Five and Six, as well as the tortious interference claim of Count Seven are precluded by the findings of the hearing examiner. The administrative hearing does not preclude Counts One through Four, or the intentional infliction of emotional distress claim contained in Count Seven.

**B. Eleventh Amendment**

Defendants next move for summary judgment on Plaintiff's claims against the state on the basis of Eleventh Amendment sovereign immunity. "The Eleventh Amendment bars suit by an individual against a State unless: (1) the State has waived its sovereign immunity and consented to be sued in federal court or (2) Congress has abrogated the States' sovereign immunity in a valid exercise of its authority to enforce the rights guaranteed by the Fourteenth Amendment."

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[5] Brockman alleges in her Complaint that the Defendants denied her equal protection by "creating falsehoods," and "imposing unfair restrictions and impossible demand." (Pl.'s Second Amend. Compl. ¶ 111.) The Court notes that such acts, without more, hardly rise to the level of constitutional significance.

[6] Beyond mention of the existence of a DFS personnel handbook, Brockman has not articulated the basis for any employment relationship beyond "merely a unilateral expectation of continued employment." Carnes v. Parker, 922 F.2d 1506, 1510 (10th Cir. 1991).

College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 670 (1999).

Defendants point to the recent Supreme Court decision in Bd. of Trustees of Univ. of Alabama v. Garrett, 121 S.Ct. 955 (2001), holding Congress did not validly abrogate the states' immunity in passing the ADA. The Garrett Court observed that abrogation can only be exercised pursuant to a "valid grant of constitutional authority" -- in this case, Section 5 of the Fourteenth Amendment. Garrett, 121 S.Ct. at 962. The reach of congressional action based on Section 5 is strictly limited to narrowly tailored legislation designed to cure proven patterns of constitutional violations by the states. Id. at 963.

The Court determined that the ADA is crafted to remedy a wide array of adverse treatment, and that much of it is of less than constitutional stature. Id. at 966. The Court also held that Congress, in creating the ADA, failed to identify a pattern of unconstitutional treatment of the disabled at the hands of state authorities. Id. Without such a showing, Congress could not invoke the Fourteenth Amendment as a basis for abrogating the Eleventh Amendment:

> Congress is the final authority as to desirable public policy, but in order to authorize private individuals to recover money damages against the States, there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation.

Id. at 967-68; see also id. at 968-69 (Kennedy, J., concurring).

Plaintiff agrees that her ADA claim against the state is barred, but has filed a Second Amended Complaint bringing claims under the Rehabilitation Act in a barely opaque attempt to dodge the Garrett decision. Brockman correctly notes that the Supreme Court has yet to apply its Garrett rationale to claims brought against states under the Rehabilitation Act.

Defendants maintain that Brockman's Rehabilitation Act claim is similarly barred, since "[t]he Rehabilitation Act contains almost identical language to the Americans with Disabilities Act." (Defs.' Supp. Mem. Of Law in Support of its Supp. Mot. for Summ. J. at 5.) Defendants cite numerous cases holding that states are immune from Rehabilitation Act claims. See Alexopolous v. San Francisco, 817 F.2d 551 (9th Cir. 1987); Sanders v. Washington, 652 F. Supp. 765 (D.C.D.C. 1986), aff'd. 819 F.2d 1151 (D.C. Cir. 1987); Stubbs v. Kline, 463 F. Supp. 110 (W.D.Pa 1978); Clift v. Fincannon, 657 F. Supp. 1535 (E.D. Tex. 1987); Patton v. Dumpson, 498 F. Supp. 933 (S.D.N.Y. 1980).

However, these cases all focus on the question of whether Congress' intent to abrogate states' sovereign immunity was explicit. They also predate Congress' adoption of the Rehabilitation Act Amendments of 1986, 42 U.S.C. § 200d-7. The Rehabilitation Act was amended in response to the Supreme Court's decision in Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985), the underlying authority for some of the decisions listed above. In Atascadero, the Court held that in passing the Rehabilitation Act, Congress' intent to abrogate states' Eleventh Amendment immunity lacked clarity and was therefore invalid. 473 U.S. at 245.

In response to Atascadero, the 1986 Amendments evince an undeniable intent to allow causes of action to be brought against states in federal court: "A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of Section 504 of the Rehabilitation Act of 1973." 42 U.S.C. § 2000d-7 (a)(1).

This provision effectively abrogates states' immunity in a rather circuitous manner. The 1986 Amendments do not serve to unilaterally abrogate the Eleventh Amendment since, as the Garrett court noted in dicta, Congress cannot "base its abrogation of the States' Eleventh Amendment immunity upon the powers enumerated in Article I." 121 S.Ct. at 162. However, grants made to the states under the Article I

Spending Clause can be conditioned on the accepting State's clear waiver of sovereign immunity. Litman v. George Mason Univ., 186 F.3d 544, 552 (4th Cir. 1999). Although the 1986 Amendments cannot unilaterally serve to abrogate the Eleventh Amendment, "any State reading [42 U.S.C. § 200d-7 (a)(1)] would clearly understand that, by accepting []funding, it was consenting to resolve disputes regarding alleged violations of the Act's anti-discrimination provisions in federal court." Bell Atlantic MD, Inc. v. MCI WorldCom, Inc., 240 F.3d 279, 292 (4th Cir. 2001); see also Sandoval v. Hagan, 197 F. 3d 484, 493 (11th Cir. 1999), rev'd on other grounds, Alexander v. Sandoval, _____U.S. _____(2001), 2001 WL 408983 ("[E]very federal circuit that has considered this issue also has found Section 2000d-7 to constitute a 'clear statement' waiver of state sovereign immunity in exchange for the receipt of federal funds."). By accepting Rehabilitation Act monies, the State of Wyoming has made itself amenable to suit.

The Supreme Court's decision in Garrett rejected Congress' attempt to abrogate the Eleventh Amendment under the ADA via Section 5 of the Fourteenth Amendment. Garrett, 121 S.CT. at 962. That holding does not delegitimize Congress' ability to coax waivers of sovereign immunity from the states through the disbursement of federal largesse. Therefore, Brockman's ADA claim against the State is barred by the Eleventh Amendment, but her Rehabilitation Act claim is not.

### C. Gender Discrimination/Retaliation

Brockman asserts claims for discrimination and retaliation under Title VII of the Civil Rights Act, 42 U.S.C. §2000e, et seq. In her initial complaint, Brockman alleged that she was subjected to a hostile work environment because of her supervisors' misapprehension that Brockman was gay. She has subsequently altered her claim to allege that she was discriminated against "because her personal characteristics did not conform to those that her supervisors and Ward

believed to be appropriate for a woman in society." (Pl.'s Second Amend. Compl. at 19.)

Sexual orientation is conspicuously and intentionally absent from the list of protected categories under Title VII. 42 U.S.C. §2000e-2(a). As a result, harassment based solely upon a person's sexual preference or orientation is not actionable under the statute. Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999); Simonton v. Runyon, 232 F. 3d 33, 35 (2nd Cir. 2000); Spearman v. Ford Motor Co., 231 F.3d 1080, 1084 (7th Cir. 2000); Rene v. MGM Grand Hotel, Inc., 243 F.3d 1206, 1209 (9th Cir. 2001).

Brockman's diaphanous attempt to claim Title VII's protections in unavailing. Recasting allegations of homophobia as "sex stereotyping" does not of itself bring the actions of Brockman's supervisors under the purview of the Civil Rights Act. Such stereotyping may or may not be actionable under Title VII, but there is a clear prerequisite that the alleged discriminatory acts be motivated by the claimant's gender.

Brockman cited the First Circuit's decision in Higgins v. New Balance Athletic Shoe, Inc., to support the viability of a Title VII sex stereotyping claim. The Court finds Higgins, which involving a male homosexual's claim of harassment by coworkers, instructive, and now quotes in part:

> Although [the plaintiff] now maintains that the evidence of co-workers mocking his supposedly effeminate characteristics supports an argument for harassment based on sexual stereotypes, he presented that evidence to the district court only as an example of discrimination because of sexual orientation. He did not mention gender stereotyping below and he did not present any considered argumentation along that line. His eleventh-hour statement to the district court that all harassment based on sexual orientation is "sex . . . related" was an unsupported conclusion, not a developed

> argument --and conclusory statements of that sort cannot defeat summary judgment.

Higgins, 194 F.3d at 261.

The Court believes Brockman's claim is similarly contrived. Brockman lists some of her personal characteristics that "do not meet the stereotypical expectations of femininity." (Pl.'s Second Amend. Compl. at 19.) But nowhere does Brockman allege these characteristics motivated adverse employment actions not tied to speculations by her supervisor that Brockman might be gay. "[A]ltercations with co-workers over work issues, and because of [] apparent homosexuality" are insufficient to show Brockman was harassed because of her sex. Spearman, 231 F.3d at 1085. To the extent sex stereotyping is punishable under Title VII, it should not be seen as an opportunity to extend the statute's provisions to nonprotected classes by way of artful pleading.

Nor can Brockman claim to be the victim of retaliation for asserting a Title VII claim. A prima facie case of retaliation requires a showing that "(1) [the plaintiff] engaged in protected opposition to discrimination; (2) [she] suffered an adverse employment action; and (3) there is a casual connection between the protected activity and the adverse employment action." O'Neal v. Ferguson Const. Co., 237 F. 3d 1248, 1252 (10th Cir. 2001).

Assuming for argument's sake Brockman was engaged in protected opposition, she has not demonstrated that she suffered adverse employment actions, nor a causal connection sufficient to survive summary judgment on this issue. Brockman's assertion that her negative work evaluations constituted punishment for protected activity carries no weight. Many of these evaluations were not generated by DFS or Brockman's supervisors, but were apparently submitted by day care providers with whom Brockman dealt in the course of her duties. The negative evaluations she did receive from her supervisors do not rise to the level of adverse

employment actions which would support an inference of retaliation. Amro v. Boeing Co., 232 F. 3d 790, 799 (10th Cir. 2000).

Additionally, many of the claimed disciplinary actions taken by Brockman's supervisors, as well as the alleged threat by Defendant Kuchera "to get her," predate the assertion of any statutorily protected right by Brockman, and so cannot be characterized as retaliation. Instead actions taken by Brockman's supervisors "simply completed the disciplinary process already set in motion." Morgan v. Hilti, Inc., 108 F.3d 1319, 1324 (10th Cir. 1997).

It is clear Brockman had serious issues with her supervisors at DFS, but federal law does not exist to cure every unhappy employment relationship. "Title VII does not make unexplained differences in treatment per se illegal nor does it make inconsistent or irrational employment practices illegal. It prohibits only intentionally discrimination based upon an employee's protected class characteristics." E.E.O.C. v. Flasher Co., Inc., 986 F.2d 1312, 1319 (10th Cir. 1992).

Therefore, because Brockman does not show that she was discriminated or retaliated against because she belonged to a protected class under Title VII, summary judgment against Counts One and Two is proper.

**D. Rehabilitation Act**

Brockman brings claims for failure to accommodate and wrongful discharge under Section 504 of the Rehabilitation Act. 29 U.S.C. § 794. In response, the individual Defendants assert qualified immunity to the extent they were performing discretionary functions that did not violate clearly established constitutional law. Summary judgment is appropriate on the Rehabilitation Act claims, according to the Defendants, since Brockman never told her supervisors that she suffered from a condition potentially covered by the Rehabilitation Act, and has not shown a violation of clearly established law.

The Court need not reach this question however, since the Rehabilitation Act (as with Title VII and the ADA) provides no cause of action against individual supervisors. See Moore v. Cooksey, 2000 WL 1838274 at *1 (10th Cir. 2000); Hiler v. Brown, 177 F.3d 542, 546 (6th Cir. 1999); Pritchard v. S. Co. Servs., 102 F.3d 1118, 1119 (11th Cir., 1996) (cert. denied, 520 U.S. 1274 (1997)). Therefore, the application of qualified immunity here is moot.

Plaintiff's Rehabilitation Act claim against the State of Wyoming and DFS is similarly vulnerable to summary judgment. Brockman asserts she is protected under Section 504 of the Act which prohibits discrimination against an "otherwise qualified individual with a disability." 29 U.S.C. § 794. To determine whether a person falls under this protected class, the Tenth Circuit applies a two part test:

> First, we must determine whether he can perform the essential functions of the job, i.e., functions that bear more than a marginal relationship to the job at issue. . . Second, if we conclude that Plaintiff is not able to perform the essential functions of the job, we must determine whether any reasonable accommodation by OAS would enable him to perform those functions.

Wells v. Shalala, 228 F.3d 1137, 1144 (10th Cir. 2000).

The conclusions reached by the administrative hearing examiner, as well as the evidence produced by both parties in this matter demonstrate that at the time of her discharge, Brockman could not perform the essential functions of her job, either with or without accommodation.

"Attendance is generally an 'essential' function of any job." Cisneros v. Wilson, 226 F.3d 1113, 1129 (10th Cir. 2000). To the extent that Brockman was "incapacitated and unable to return to work from February 19, 1999 to August 17, 1999" (Ex. O at 4.), no reasonable accommodation was available. If Brockman were ever able to return to her duties at DFS, "[a]n employer is not required to wait indefinitely for

her recovery." Smith v. Blue Cross Blue Shield, 102 F.3d 1075, 1077 (10th Cir. 1996) (addressing reasonable accommodation under the ADA).

Therefore, Brockman has no cognizable Rehabilitation Act claim against the State or the individual Defendants.

**E. Pendent State Claims**

Brockman's claims of intentional interference with contract and breach of contract was disposed of by the order of the Office of Administrative Hearings. Brockman also asserts a claim against the individual Defendants for intentional infliction of emotional distress.

Defendants invoke the protection of the Wyoming Governmental Claims Act ("WGCA"). Wyo. Stat. § 1-39-101, et seq. The Act immunizes entities of the state and their employees from tort liability. Wyo. Stat. § 1-39-104. Intentional infliction of emotional distress is not among the enumerated exceptions to the WCGA. See Wyo. Stat. §§ 1-39-105 to -112, and 121.

Brockman responds that by its terms the WCGA only immunizes public employees "while acting within the scope of duties." Id. She argues this means the statute does not apply to intentional torts. Brockman does not cite any authority for this novel interpretation of the WCGA. In fact, the Wyoming Supreme Court has held "infliction of emotional distress was not barred under Wyoming's law of sovereign immunity. There is nothing in any section of the [WCGA] . . . which would serve to abrogate sovereign immunity for these claims." Routh v. State, 952 P.2d 1108, 1116 (Wyo. 1998). Therefore, Brockman's intentional infliction of emotional distress claim is barred.

**II. Plaintiff's Motion for Summary Judgment on Family Medical Leave Act Claims and Defendants' Supplemental Motion for Summary Judgment.**

As discussed above, the findings of the administrative hearing conclusively disposed of Brockman's FMLA claims,

so she cannot ask this Court to reverse those findings on her Motion for Summary Judgment. To the extent all of Brockman's claims have been disposed of in the foregoing discussion, her additional arguments for summary judgment in her favor are unnecessary.

## Conclusion

Brockman's claims against all Defendants under the Family Medical Leave Act (Count Six), §§ 1983, 1985 and 1988 (Count Five), as well as her state law claims for interference with contract and breach of contract (Count Seven) are precluded by the administrative hearing conducted by the state of Wyoming after her discharge at DFS. Eleventh Amendment sovereign immunity bars Brockman's claims against the State under the Americans with Disabilities Act (Counts Three and Four). Brockman has not stated a cognizable claim against Defendants for relief from discrimination and retaliation under Title VII (Counts One and Two). The Rehabilitation Act does not confer a right of action against the individual Defendants, and Brockman does not qualify as an "otherwise qualified individual" eligible to bring a Rehabilitation Act claim against the State (Counts Three and Four). Brockman's remaining state law claim for intentional infliction of emotional distress (Count Seven) is barred by the Wyoming Governmental Claims Act.

**THEREFORE**, it is **HEREBY ORDERED** that Defendants' Motion for Summary Judgment is **GRANTED** as to all of Plaintiff's claims. Plaintiff's Motion for Summary Judgment on Family Medical Leave Act Claims is **DENIED**. Defendants' Supplemental Motion for Summary Judgment is **DENIED AS MOOT.**

Dated this ____day of _____, 2001.

s/_____
CLARENCE A. BRIMMER
UNITED STATES DISTRICT JUDGE

ENTERED
ON THE DOCKET
May 9, 2001
(Date)
Betty A. Griess, Clerk
By s/
Deputy Clerk

**IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

**STATE OF WYOMING**

| | |
|---|---|
| IN THE MATTER OF THE HUMAN RESOURCES APPEAL PROCEEDING OF:STATE OF WYOMING ex rel.DEPARTMENT OF FAMILY SERVICES, | ) |
| Petitioner, | ) |
| v. | ) OAH DOCKET NO. 00-006-006 |
| KATHIE BROCKMAN, | ) |
| Respondent. | ) |

ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER came before the Office of Administrative Hearings (Office) on November 30, 1999 upon the Petitioner's Motion for Summary Judgment received November 22, 1999. The Petitioner (DFS) appeared by and through counsel, Terry L. Armitage. The Respondent (Brockman) appeared by telephone and by and through counsel, Mitchell E. Osborn. DFS' Exhibits 1 through 8 and Brockman's Exhibit A were received into evidence at the hearing. Prior to the issuance of the written decision in this matter, this Office received written correspondence directly from Brockman which will be considered as pleadings in this matter, but not as evidence. The Office, having considered the other pleadings in the file and argument of the parties on the motion, makes the following findings of fact and conclusions of law:

## FINDINGS OF FACT

1. The issue in this case is the appropriateness of DFS' May 17, 1999 termination of Brockman for incapacity and/or refusal to perform her duties.

2. Since 1992, Brockman was employed as a permanent, full-time Facility Licensing Officer for DFS. On April 19, 1999, Brockman's supervisor, Robert Kuchera, notified Brockman, in writing, of the intent of DFS to dismiss her from employment. Exhibit 7. A subsequent letter from Kuchera dated May 7, 1999, advised Brockman that she would be terminated on May 17, 1999. On May 24, 1999, Brockman timely appealed the termination and the case was transferred to this Office on August 3, 1999. Exhibit 1, p. 8.

3. Scheduling the hearing in this matter was delayed when Brockman submitted evidence from her psychiatrist that she was incapable of participating in her defense due to her emotional instability. Brockman retained counsel and on October 5, 1999 acknowledged that she was ready to proceed. On October 7, 1999, the case was set for hearing on December 7, 1999.

4. On November 22, 1999, DFS filed a Motion for Summary Judgment. Brockman filed a response to the motion on November 26, 1999. The parties had previously filed disclosure statements with attached exhibits. In deciding the Motion for Summary Judgment, this Office has considered all pleadings in its file, as well as all evidence and argument submitted by the parties.

5. Brockman has been employed with DFS since 1992. Over the course of her employment, Brockman estimated she has filed some 70 grievances against DFS concerning a wide range of issues and has not been successful on any of them. Exhibit 1, p. 106. Prior to her termination, Brockman had received three suspensions without pay, two reprimands, and two letters of expectation. Exhibit 1, p. 120. Leading up to the May 17, 1999 termination, Brockman had been absent

from work off and on for extended periods of time due to emotional instability. Exhibit 1, p. 9.

6. On January 22, 1999, Brockman received notice from her employer that she had depleted all leave under the Family Medical Leave Act (FMLA). Exhibit 3. DFS initially placed Brockman on suspension without pay until February 19, 1999. At that time, Brockman informed DFS she could not return to work because she was experiencing panic attacks, depression, difficulty sleeping, stomach problems and headaches. Brockman had been experiencing varying degrees of these problems since April 1997. Exhibit 1, p. 10. On February 26, 1999, DFS informed Brockman that all her accrued sick and annual leave would be exhausted as of March 1, 1999. On March 1, 1999, Brockman was again placed on leave without pay. Exhibit 5. Brockman acknowledged that she had depleted all accrued sick and annual leave as of March 1, 1999. In July 1999, Dr. Long, Brockman's treating psychiatrist, wrote a letter stating that Brockman could not return to work full time until mid August 1999. Exhibit 1, p. 13.

7. Brockman applied for additional FMLA leave in March 1999. In connection with that request, DFS informed Brockman that she was to be evaluated by a doctor in Evanston. Brockman cancelled the appointment and no evaluation was completed. Brockman argues that FMLA leave was improperly calculated and when she was notified of this, she suffered a setback of health which delayed her recovery from her medical condition.

8. On April 19, 1999, DFS informed Brockman of its intent to terminate her from her position due to her incapacity to perform her duties and refusal to work. In doing so, DFS "considered [Brockman's] past work history including, but not limited to, a review of [her] personnel file, past disciplinary measures, verbal communications, [her] overall work performance history and overall work performance appraisals. . . ." Exhibit 7. Brockman never notified DFS that she was able to return to work prior to her termination.

Additionally, no medical evidence was submitted to DFS, nor to this Office, that supports Brockman's contention that she would have been able to return to work but for the improper FMLA leave calculation. To the contrary, the evidence from Brockman's testimony, as well as her psychiatrist, shows that Brockman was incapacitated and unable to return to work from February 19, 1999 through August 17, 1999, well beyond the 90 days allowed by the FMLA. Additionally, Brockman submitted no evidence supporting her argument that her FMLA leave was improperly calculated.

9. Brockman also argues that sick leave was potentially available through donations from other State employees. Donation of sick leave by co-employees is strictly voluntary and Brockman had neither an expectation nor an entitlement to it.

10. After considering all of the evidence presented both in support of and in opposition to the Motion for Summary Judgment, the Office finds that Brockman cannot overcome the evidence offered in support of summary judgment by DFS. DFS has shown that good cause exists for Brockman's dismissal in that she was incapable of performing her duties for an extended period of time, well after all available time had been exhausted. In accordance with Rule 56 of the Wyoming Rules of Civil Procedure, summary judgment should be granted.

## CONCLUSIONS OF LAW

1. This case came to the Office of Administrative Hearings pursuant to Wyo. STAT. ANN § 9-2-1019(a) (LEXIS 1999).

2. DFS bears the burden of proof in the proceedings herein. "The general rule in administrative law is that, unless a statute otherwise assigns the burden of proof, the proponent of an order has the burden of proof," JM v. Department of Family Services, 922 P.2d 219, 221 (Wyo. 1996) (citation omitted).

3. Regarding summary judgment, the Wyoming Supreme Court has said:

> We hold summary judgment is available in contested case hearings before the Office of Hearing Examiners. It should be invoked when, in the language of Wyo.R.Civ.P. 56(c), "[t]here is no genuine issue as to any material fact and * * * the moving party is entitled to judgment as matter of law."

Neal v. Caballo Rojo, Inc., 899 P.2d 56, 62 (Wyo. 1995).

4. Wyo.R.Civ.P. 56(c) (LEXIS 1999) is also pertinent in this matter and reads in part as follows:

> The judgment sought shall be rendered forthwith if the pleadings . . . on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

5. Brockman was a permanent employee of the State of Wyoming and, therefore, subject to the State of Wyoming Personnel Rules. Those rules state in relevant part that an agency head may discipline a permanent employee for cause for incapacity to perform her duties. State of Wyoming Personnel Rules (Personnel Rules), Ch. 11 § 1(b) (ii) (1998). Types of discipline include dismissal of the employee. Personnel Rules, Ch. 11, § 3(c) (1998).

Regarding dismissal, the Personnel Rules provide:

> (c) Dismissal.
>
> (1) Dismissal of Permanent Employees. If previous disciplinary action has not served to achieve corrective results, or if the nature and extent of the employee's behavior is such that other disciplinary action is not appropriate, the agency head may dismiss a permanent employee.

(A) Prior to the dismissal of a permanent employee, the agency head shall provide to the employee written notification specifying:

(I) The reason(s) and summary of the evidence for dismissal; and

(II) An opportunity for the employee, within ten (10) working days, to respond in writing to the charge(s).

The agency head shall have three (3) working days to consider the response. If the agency head perceives that the employee's presence on the job may be detrimental to the operation of the agency, the agency head may suspend the employee, with pay, pending the dismissal review period.

B. If after the dismissal review period the agency head determines dismissal is appropriate, the agency head shall provide, personally or by return receipt requested certified mail, written notification to the employee specifying:

(I) The reason(s) for the dismissal;

(II) The effective date of the dismissal; and

(III) The right to a hearing pursuant to these rules.

A copy of the notice of dismissal shall be sent to the Human Resources Division by the agency head.

(ii) Failure to comply with the procedural steps in this chapter by the agency terminates the dismissal procedure without prejudice. Parties shall be

restored to the previous status held prior to the disciplinary action.

Personnel Rules, Ch. 11 § 3 (c) (i) and (ii) (1998). DFS has shown through Brockman's sworn testimony, as well as that of her psychiatrist, that Brockman was incapable of performing her duties well after all available leave time had been exhausted. DFS has also shown that it followed the above quoted State of Wyoming Personnel Rules in dismissing Brockman from employment.

6. DFS moved for summary judgment, Brockman filed its response, and the Office finds there is no genuine issue of material fact. The Office therefore concludes that DFS is entitled to judgment as a matter of law.

ORDER

IT IS THEREFORE ORDERED that:

1. The November 22, 1999 Motion for Summary Judgment filed by the Department of Family Services is GRANTED.

2. The May 17, 1999 dismissal of Brockman by the Department of Family Services is UPHELD.

3. The December 7, 1999 hearing date is vacated.

4. This case is returned to the Department of Human Resources Division of Administration and Information.

DONE this 30th day of December, 1999.

s/_____
Deborah Baumer, Hearing Examiner
State of Wyoming
OFFICE OF ADMINSTRATIVE HEARINGS
Cheyenne, Wyoming 82002-0270
(307) 777-6660

CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing document was served upon the Administration and Information Human Resources Division and a true and correct copy was served upon the parties by mailing same, postage prepaid, on the 30th day of December, 1999, addressed to the following:

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s/_____
Office of Administrative Hearings